

CHE MAN BIN CHE MUD

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v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, KUALA LUMPUR
DATO' ABDUL AZIZ BIN MOHAMAD J.
[CRIMINAL APPEAL NO.42-21-1991]
22 OCTOBER 1994

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CRIMINAL LAW: Theft - Ingredients - Movable property - Whether subject of theft must be movable property - Whether movable property meant only corporeal property - Notional sum of monies - Whether a movable property - Penal Code ss. 22, 378, 381.

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CRIMINAL LAW: Abetment - Proof of offence - Appellant convicted of abetment of theft on circumstantial evidence - Principal offence - Whether to be proved.

EVIDENCE: Abetment - Principal offender pleaded guilty - Admitted facts - Whether facts admitted by principal offender applied to abettor - Whether admitted facts to be independently proved.

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WORDS AND PHRASES: "movable property" - Section 378 Penal Code

The appellant is an advocate and solicitor practising in Kota Bharu, Kelantan, under the style of Che Man & Partners. Sometime prior to July 1988, the appellant was involved in a plan to defraud Bank Negara Malaysia (Bank Negara). The plan was successfully executed and the result was that on 2 July 1988, RM22.2 million belonging to Bank Simpanan Nasional (BSN), which BSN remitted to Bank Negara for the credit of Bank Negara's Accountant General, found its way instead to the account of Che Man & Partners at the Menara Dayabumi branch of Bank Bumiputra Malaysia Berhad (the said account), which the appellant had opened on 1 July 1988.

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Subsequent to the fraud, one Harun, a former clerk of Bank Negara, was charged with criminal breach of trust and two alternatives charges of cheating and theft by clerk under ss. 409, 420 and 381 respectively of the Penal Code, in respect of the monies. Harun pleaded guilty to the second alternative charge of theft and was sentenced to 5 years imprisonment. Before the same Sessions Judge, the appellant faced a principal charge and two alternative charges of abetting the respective offences alleged against Harun. The appellant claimed trial on all three charges but was convicted on the alternative charge of abetment of theft and was sentenced, in consequence, to 4 years imprisonment and ordered to pay Bank Negara RM 333,000. The appellant appealed.

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The evidence showed that, at the said Bank Negara, Harun was attached to the Public Debt Division and one of his duties was to handle cheques for advance subscription for Government Securities. In line with his duty thus, on 1 July 1988, Harun received a cheque for RM22.2 million issued by BSN as advance subscription for Government Securities, together with the application form therefor. By the rules governing the manner Harun was to discharge his duty, he was to register the application in the Advance Subscription Register and thereafter prepare a credit slip to credit the amount into the Advance Subscrip-

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a tion Account. In addition, he ought also to prepare a debit voucher to debit RM22.2 million against the Advance Subscription Account and another credit slip to recredit that amount to the Accountant General's account. PW5 and PW6, Harun's superior officers, were supposed to sign the said credit slips and debit voucher, after which the documents would be presented to the Kuala Lumpur branch of Bank Negara to effectuate the necessary debiting and crediting.

b Harun had forged the signature of PW5 and PW6 and by that, was able to credit the RM22.2 million to the said account instead of to the Accountant General's account, which he did on 2 July 1988. It was also evident that after the monies had been so credited, the appellant had signed and issued 5 open cheques amounting to RM22.2 million against the said account and by 14 July 1988, the whole of the RM22.2 million was paid out by the Dayabumi branch. Evidence was

c also led which showed that on 8 July 1988 RM 333,000 was credited from the account of Che Man & Partners at the Dayabumi branch to the account of that firm in Kota Baru, Kelantan.

Before the High Court, the primary issue that arose was whether, on the facts, despite the guilty plea of Harun herein, an offence of theft had been committed by him, and if so, whether the appellant had abetted that offence.

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Held:

e [1] Although to constitute the offence of abetment it is not necessary that the act abetted should be committed, in the circumstances of this case, where there is no direct evidence of any arrangement between Harun and the appellant and where the evidence relied on for proof of abetment is circumstantial, no charge of abetment against the appellant can stand without it being proved that Harun did commit the related principal offence.

f [2] It is fundamental that facts alleged by the prosecution and admitted by a person who has pleaded guilty cannot be taken as proven against another person. The facts admitted by a person who has decided to plead guilty may include facts which the prosecution, although believing in them, may not be able to prove were the person to claim trial. Then again the facts alleged and admitted may not be totally accurate. These aside, to accept the admitted facts as proven against another person would be tantamount to accepting the evidence of the person pleading guilty without the other person being given an opportunity to cross-examine him. In the circumstances the facts which Harun has admitted when

g pleading guilty to the second alternative charge against him, cannot apply or be used against the appellant and the prosecution is duty bound to prove those facts against the appellant.

h [3] Under s. 378 Penal Code, the subject of theft must be "movable property". The words "movable property", by the manner they are defined in s. 22 of the Code, must refer to corporeal property, that is to say, property consisting or in the form of a material object. It must be something that can be perceived by the senses. It follows therefore that there cannot be theft of incorporeal property. Also, to constitute theft under s. 378, there must be a dishonest intention to take a movable property out of its rightful possession coupled with the act of moving that property. The movable property intended to be taken must be the one and the same movable property that is actually moved. That movable property is the

i one that is to be the proper subject of the charge.

[4] In the present abetment charge against the appellant, the movable property which was the subject of the alleged theft by Harun, was stated to be RM22.2 million. A question hence arose as to what corporeal thing does that refer to. On the facts the only possible corporeal things are the Bank Simpanan Nasional cheque for RM22.2 million and the currency notes totalling RM22.2 million that the Dayabumi branch paid out through Nordin. It cannot be the cheque as, if so, the charge would have said so. Neither can it be the currency notes paid out because Harun did not move them and they left the possession of Bank Bumiputra with Bank Bumiputra's consent. There was thus no theft by Harun of those currency notes within the definition of s. 378. If it is neither the cheque and nor the money paid out, the subject as stated in the charge can only be a notional amount or sum of what is owing to somebody, and that is not movable property.

[5] In this case what Harun did was not to move a movable property with the intention of taking the same property out of the possession of Bank Negara but to manipulate things in such a way that, instead of Bank Negara becoming indebted to the Accountant General in the sum of RM22.2 million, it became indebted to Bank Bumiputra in that amount and Bank Bumiputra in turn became indebted to Che Man & Partners in an equal amount, which debt was discharged when Bank Bumiputra, at its Dayabumi branch, paid out monies totalling RM22.2 million on cheques issued by the appellant. No cash money passed from Bank Negara to Bank Bumiputra.

[6] The contention by the prosecution that the offence of theft by Harun was completed when money was cashed by the appellant i.e when cash was paid out on the appellant's cheques, cannot be sustained. It is obvious that by s. 378, the offence of theft is completed the moment the movable property in question is moved. Viewing what the learned Deputy Public Prosecutor had said he was thinking that the moving was done when the money was paid out and that therefore the movable property was the money that was paid out. The fact however is that Harun did not move the money. Rather the money came from the possession of Bank Bumiputra, and not Bank Negara, and Bank Bumiputra, on its part, had consented to the money being paid out. Harun did not commit theft as defined in s. 378 and accordingly the appellant could not rightly have been convicted of abetment of theft by Harun.

[7] On the facts and the evidence before her, the trial Judge was right in finding that the prosecution had not made out a case to answer on the principal charge or the first alternative charge against the appellant.

[Appeal allowed. Conviction and sentence set aside].

Cases referred to:

Regina v. Crick, *Times Law Report*, 18 August 1993. (*dist*)
Public Prosecutor v. Yeoh Teck Chye [1981] 2 MLJ 176 (*refd*)

Legislation referred to:

Criminal Procedure Code 426(i)(b)
Evidence Act 1950
Penal Code ss. 4(1), 22, 378, 378 Explanations 3 and 4 Illustration (b), 381, 384, 405, 408, 409, 420
Theft Act 1968 (U.K)

- a* For the appellant - Shafee & Jahaberdeen; T/n. Shafee & Co.
For the respondent - Zainal Adzam, DPP.

JUDGMENT

Dato' Abdul Aziz bin Mohamad J:

- b* On 17 April 1989 one Harun bin Othman and the appellant were charged in the Sessions Court in Kuala Lumpur. Harun faced a principal charge of criminal breach of trust by an agent under s. 409 of the Penal Code, a first alternative charge of cheating under s. 420 and a second alternative charge of theft by a clerk under s. 381. In all the three charges, the time of commission of the offence was said to be between 1 July and 14 July 1988, the place was said to be at Bank Negara Malaysia in Kuala Lumpur, and the property the subject of the offence
- c* was said to be "Malaysian Ringgit 22,200,000". The appellant faced a principal charge and two alternative charges of abetting the respective offences alleged against Harun. The dates were as in the charges against Harun, but the place of abetment was said in all the three charges to be at Bank Bumiputra Malaysia Berhad Menara Dayabumi Branch in Kuala Lumpur.
- d* On 5 May 1989 Harun pleaded guilty to the second alternative charge of theft, the offence for which the penalty prescribed is the least severe of the three. He was convicted and sentenced to five years imprisonment and a fine of RM50,000. He has served his sentence.

- e* The appellant claimed trial on the three charges and was tried by the same Sessions Court judge who had dealt with Harun. At the close of the case for the prosecution, she found that the prosecution had made out a case of theft against the appellant and she acquitted him of the other two charges. After the close of the defence, she found the appellant guilty and convicted him on 17 May 1991. On 18 May 1991 she sentenced him to four years imprisonment and ordered him, under s. 426(i)(b) of the Criminal Procedure Code, to pay compensation of RM333,000 to Bank Negara.

- f* He has now appealed against his conviction and sentence.

- g* Although to constitute the offence of abetment it is not necessary that the act abetted should be committed, in the circumstances of this case - where there is no direct evidence of any arrangement between Harun and the appellant and where the evidence relied upon for proof of abetment is therefore circumstantial - no charge of abetment against the appellant can stand without it being proved that Harun did commit the related principal offence.

- h* At the trial, the prosecution tendered the record of the proceedings against Harun, which contained a statement of the facts alleged against him and admitted by him. One of the grounds of appeal is that the record should not have been admitted because its admission was harmful in that the learned trial judge was influenced by those admitted facts in coming to a finding that Harun had committed theft and that the appellant had abetted the theft.

- i* I need only say this about this ground. Whatever view one may take about the admissibility of the record of proceedings under the Evidence Act 1950 - which was debated in this appeal - I think it is fundamental that facts alleged by the

prosecution and admitted by a person who has pleaded guilty cannot be taken as proven against another person. The facts admitted by a person who has decided to plead guilty may include facts which the prosecution, although believing in them, may not be able to prove were the person to claim trial but which he chooses to admit because he wishes the charge against him to be over and done with. Then again facts alleged and admitted may not be totally accurate, but he is not concerned to have the facts put right since he is pleading guilty and the question of accuracy is not seen by him at the moment as of any importance to him. Aside from those considerations, to accept the admitted facts as proven against another person would be tantamount to accepting the evidence of the person pleading guilty without the other person being given an opportunity to cross-examine him.

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Having said that, however, I do not find it necessary, to dispose of this appeal, to consider whether the record of proceedings had influenced the learned trial judge in her findings because I am going to proceed according to what I, on my own reading of the evidence, find to be the facts established by the rest of the evidence for the prosecution.

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The facts are these.

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Harun was a clerk in the Public Debt Division of the Accounting Department of Bank Negara Malaysia in Kuala Lumpur. He was, among other duties, in charge of receiving cheques for advance subscription for Government Securities.

At the beginning of June 1988, a businessman, Abdullah bin Che Man (PW34), was, by appointment, introduced to Harun at Genting Highlands. Harun told him that he was a Bank Negara Officer. Harun wanted him to open an account at a bank to facilitate the withdrawal of cash and to look for a lawyer to make it easier to handle the matter. Harun told Abdullah that he had a cheque from a government body to bank in. The cheque was from some investment. He said 45 per cent of the amount would be given to Abdullah and the rest would be given to UMNO. Three days later, when Abdullah met Harun again at Genting Highlands, he told Harun that he was unable to oblige.

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On or about 29 June, the assistant manager of the Dayabumi branch of Bank Bumiputra Malaysia Berhad (PW14) was told by the branch manager, Nordin bin Abu Bakar (PW15), to attend to a big client who would be coming to open a big account. According to Nordin, a man saying he was calling from Kota Baru had rung him up to enquire about opening a legal firm's account, and one Norlah Khan, who used to have at the Dayabumi branch a business account, had also rung him up, I presume about the same matter. Nordin described Norlah Khan as a "Mr. Personality", a man who exuded confidence and was convincing.

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Sometime before 1 July, the administrative officer of the Public Debt Division (PW5), when passing by Harun's table during lunch hour, saw him practising her signature. Harun said, when this was noticed, "Your signature is easy to follow".

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On 1 July, Bank Simpanan Nasional, which had an account with Bank Negara, issued a cheque for RM22.2 million in favour of Pendaftar Hutang Negara as advance subscription for Government Securities. Between 11.30 a.m. and 12.30 p.m. the chief clerk of Bank Simpanan Nasional (PW2) handed the cheque to Harun at the Public Debt Division of Bank Negara together with the Government Securities application form.

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- a* Harun should have registered the application in the Advance Subscription Register. He should then have prepared a credit slip to credit the amount into the Advance Subscription Account. He should also have prepared a debit voucher authorizing the debiting of RM22.2 million against the Advance Subscription Account and the crediting of the like amount to the Accountant-General's account. The credit slip should have been signed by the aforementioned administrative officer of the Public Debt Division (PW5). The debit voucher should have been signed by that officer and a senior administrative officer (PW6). Harun should have caused those documents to be sent up to them for their signature. The documents duly signed would have come back to Harun. Harun should have caused them to be sent to the Kuala Lumpur branch of Bank Negara for the necessary debiting and crediting to be effected. According to the teller at that branch (PW8), sometimes it would be Harun's office boy who would bring the documents to him for that purpose, but usually it would be Harun himself. What actually happened will be seen shortly.

- d* On the same day, 1 July, the appellant came alone to the Dayabumi branch of Bank Bumiputra and opened a current account in the name of Che Man & Partners, which was a sole proprietorship account with one authorized signature. There can be no doubt that was the opening of account about which Nordin the branch manager had instructed his assistant manager on 29 June. The appellant told the assistant manager that he was the sole proprietor of the firm. He was given a cheque book the same day.

- e* The appellant explained to the assistant manager that it was better, to speed up the clearing of cheques, to open an account in Kuala Lumpur than in Kota Baru, where the law office of Che Man & Partners was.

It was assumed that it was an office account because the appellant did not specify it was to be a client's account.

- f* While the appellant was with the assistant manager on the business of opening the account, Norlah Khan telephoned Nordin the branch manager to ask if Che Man the lawyer had opened an account with the bank. Nordin, having noticed the appellant was then with the assistant manager, told Norlah Khan that Che Man had opened an account but, according to Nordin, he did not give the account number to Norlah Khan. That, according to Nordin, was the only time he saw the appellant.

- g* Also on the same day, 1 July, there was a lunch at the Bilal Restaurant attended by two employees of Bank Bumiputra and four Bank Negara employees from the Public Debt Division. The normal conversation at the lunch was about political funds. Harun, who was present, told Md. Fuad bin Abdullah (PW9), who was a dealer in the Bank Bumiputra Money Market, and who thought Harun was an officer, that he would be receiving large political funds from overseas which he would be handling at Bank Negara.

- i* Next day, 2 July, RM22.2 million was debited against the Bank Simpanan Nasional account. On the same day the credit slip was prepared to credit that amount to the Advance Subscription Account and the debit voucher was prepared to debit that account with that amount, but instead of authorizing a credit to the Accountant-General's account, it authorized a credit to Bank Bumiputra's

account No. 1554010059 at Bank Negara. A credit slip to credit that account was also prepared the same day. Those three documents were forged. They bore signatures that looked like the signature of the aforementioned administrative officer (PW5) although the officers who should have signed them did not sign them. The signatures were not theirs. The documents were never brought to the executive officer of the Public Debt Division (PW7) by whom they should have been forwarded for onward transmission to get the correct signatures.

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Harun did not, as he should, register the advance subscription in the Advance Subscription Register.

The three forged documents were presented to the teller of the Kuala Lumpur branch of Bank Negara (PW8) the same day. The cheque for RM22.2 million was credited to the Advance Subscription Account, as it should, but that account was then debited with that amount which was then credited to Bank Bumiputra's account No. 1554010059, as it should not. It should have been credited to the Accountant-General's account.

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The result of all that was that Bank Simpanan Nasional's account was debited with the sum of RM22.2 million but the credit, instead of going to the Accountant-General's account, went to Bank Bumiputra's account No. 1554010059, and the Public Debt Division register did not have Bank Simpanan Nasional's advance subscription.

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I should mention that in the end Bank Simpanan Nasional did not suffer any loss as Bank Negara had honoured its obligations in respect of the advance subscription.

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According to Nordin the Dayabumi branch manager, that same morning he received a telephone call from a person who said that he was Che Man, that he was expecting a substantial sum of money to be credited into his account of Che Man & Partners and that he would give Nordin instructions when the money arrived. Fifteen minutes later Norlah Khan telephoned Nordin to say that he was a representative of Che Man & Partners and to ask if there had been a credit to their account that day. After checking, Nordin replied that there had not been a credit yet.

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Also on the same morning, Md. Fuad, the aforementioned Bank Bumiputra Money Market dealer, received a telephone call from Harun with instruction to credit RM22.2 million into the account of Che Man & Partners, Advocates & Solicitors, at the Dayabumi branch of Bank Bumiputra by order of the Public Debt Division and with reference to "Pentadbir Pusaka Tengku Arif Bendahara". Md. Fuad prepared a money market credit voucher for that purpose.

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Money Market was part of the functions of Bank Bumiputra Treasury Office. Part of the functions of Money Market was to receive instructions from a bank for payment to another bank, and in performing that function it acted as agent of the instructing bank.

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The money market credit voucher was received by an officer at Bank Bumiputra headquarters (PW11), who then prepared an inter-bank receipt confirmation voucher addressed to the Dayabumi branch with instruction to credit as instructed by Harun. At 10.50 a.m. that officer relayed the instruction by telephone to a Dayabumi branch officer (PW12), who confirmed the message. At that

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a point in time, the Dayabumi branch was credited with RM22.2 million ringgit and the Public Debt Division was debited with that amount. Subsequently on the same day the Dayabumi branch credited RM22.2 million to the account of Che Man & Partners. At 11.00 a.m. Norlah Khan again telephoned Nordin, who now confirmed that the money had arrived. Norlah Khan said "they" wanted to withdraw RM1 million.

b At about 11.15 a.m. Norlah Khan came with another man and gave Nordin an open cheque for RM1 million payable to Zainuddin bin Zakaria. When asked where Zainuddin was, Norlah Khan replied he was ill. When asked why he needed so much money urgently, Norlah Khan explained that the RM22.2 million was for UMNO political activities in Kelantan. Nordin approved the cheque and paid the money to Norlah Khan without insisting on Norlah Khan's signature at the back of the cheque.

c Two days later, on 4 July, Harun resigned from Bank Negara after giving twenty-four hours' notice.

d On the same day, 4 July, Norlah Khan again telephoned Nordin to say he intended to cash RM5 million. When Norlah Khan telephoned again for confirmation that there was money available, he told Nordin that he was sending someone to collect it. The man came with an open cheque for RM5 million, got the money and left without having to prove his identity or to sign at the back of the cheque.

e On the next day, 5 July, Norlah Khan telephoned Nordin again to say he wished to withdraw RM5 million and that he would be sending someone to collect the money. This time the person who came to collect was one Norseto bin Suratman (PW16). He brought the cheque and received the money without having to identify himself or to sign at the back of the cheque. Norseto gave the money to Norlah Khan.

f Norseto had come to Malaysia in 1987 to be employed by one Sarimin bin Darwi as a cowherd at a farm in Kampung Cahaya Setia in Selangor. According to Norseto, Norlah Khan's younger brother had been adopted by Sarimin's father. On 5 July it was Sarimin who had taken Norseto to Norlah Khan's office. From there Norlah Khan and driven Norseto to the bank.

g On the same day, in Kuala Lumpur, the appellant paid RM85,000 in cash for a Mercedes Benz 280SC which he had bargained for the previous day, but the purchase was in the name of Mohamed bin Salleh (PW19), the appellant's driver and jaga.

Also on that day, 5 July, the appellant took Mohamed bin Salleh to Bank Bumiputra and asked him to open an Amanah Saham Nasional account into which he put RM49,000 which the appellant had given him.

h After the purchase of the Mercedes Benz, the appellant went to Genting Highlands in the company of Mohamed bin Salleh and several others.

i Jusoh bin Abdullah (PW24), the appellant's clerk, testified that he often went to Genting Casino with the appellant. In early July, Jusoh did go there with the appellant in Jusoh's car and the appellant had won RM300,000. Previous to that the appellant had won many times, and on one occasion he won RM150,000 or RM100,000, but, according to Jusoh, two or three days later he would go back and then lose.

**Che Man Bin Che Mud v.
Public Prosecutor**

[1994] 4 CLJ

Abdul Aziz bin Mohamad J.

831

According to Abdullah bin Che Man, the businessman mentioned earlier, at the end of June 1988, he saw the appellant playing roulette in Genting Casino and winning RM200,000 or RM300,000.

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On 7 July, the appellant took Mohamed bin Salleh to the Hongkong & Shanghai Bank and deposited into the account of Mohamed cash amounting to RM100,000, a cheque for RM12,996.10 and another cheque for RM19,994. According to Mohamed, the appellant told him that the RM100,000 was winnings from Genting Casino.

b

On 8 July a sum of RM333,000 was credited from the account of Che Man & Partners at the Dayabumi branch to the account of that firm in Kota Baru, which was an office account of a sole proprietorship, the sole proprietor being the appellant.

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On 10 July, Norlah Khan again telephoned Nordin to say that he wished to withdraw RM5 million. The next day, 11 July, Norseto came with the cheque and got the money without having to identify himself or sign at the back of the cheque. As on 5 July, Sarimin had taken Norseto to Norlah Khan's office and Norlah Khan had driven him to the bank.

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On 14 July, Sarimin sent Norseto to Norlah Khan's office again. Norlah Khan drove Norseto to the bank. Norlah Khan gave Norseto a cheque for RM5,867,000 to cash. Norseto went to Nordin's office with the cheque but it could not be honoured due to a technical error. Norseto brought the cheque back to Norlah Khan at the underground car park. Norlah Khan gave the cheque to the appellant, who was there then. The appellant left and returned fifteen minutes later with another cheque. Norseto went to Nordin again with this cheque and got the money, again without having to identify himself or sign at the back of the cheque.

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Sarimin paid Norseto RM400 for his services in cashing the cheques.

So the RM22.2 million was paid out clean by 14 July. All the cheques that were cashed were open cheques made payable to Zainuddin bin Zakaria, I.C. No. 4836693, and signed by the authorized signatory, the appellant. The police found out later that I.C. No. 4836693 did not relate to Zainuddin bin Zakaria but related to one Dusuki bin Draman of Berangan, Tumpat. The police had obtained the I.C. from the Registration Department. The two persons could not be traced.

f

Around this time, Hj. Othman bin Abd. Razak (PW23), whose wife was the sister of a wife of the appellant, met the appellant at the Pan Pacific Hotel in Kuala Lumpur, when the appellant introduced him to one Abd. Rahman bin Ayub and gave him RM5,000 for his, Hj. Othman's, family expenses.

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According to Nordin, the Dayabumi branch manager, around 21 July he placed an amount of RM1,500,000 in cash of Norlah Khan's money in the keeping of a moneylender in Kuala Lumpur on trust and without interest.

h

Noor Zan bin Zakaria (PW20), an employee of Che Man & Partners, told of receiving two telegraphic transfers from Kuala Lumpur in July under his personal account, the sums being RM85,000 and RM100,000 respectively. He said he did not know from whom the transfers were, but they were from an office

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- a* client and someone at the office told him the money was for the firm. In July also, at the office in Kota Baru, the appellant gave him notes in RM1,000, RM500 and RM100 denominations which the appellant asked him to keep in a safe deposit box at a bank and which he kept at the Malayan Banking Berhad in Kota Baru in his name and that of Mohamed bin Salleh, whom I have mentioned earlier.
- b* According to Noor Zan, in July and August, on instruction, he made payments totalling RM200,000 or more out of the safe deposit box and the moneys from the telegraphic transfers. The instructions came in the form of notes which he found on his table. Among the payments made were RM50,000 to one Ibrahim from Jertih, RM14,000 to Omar bin Mahmud (PW22), the appellant's brother, for a project of which he was in charge, and tens of thousands more to Omar, RM4,000 for office expenditure, RM97,000 by telegraphic transfer to the appellants wife
- c* Azizah in Kuala Lumpur, RM40,000 to Noor Zan's mother, which was later transferred to Noor Zan's ASN account, and tens of thousands to the appellant's mother. On 23 July, Azizah, the appellant's wife, opened an account at Malayan Banking in Jalan Bandar Kuala Lumpur, deposited RM97,000 and withdrew RM50,000. According to Omar, the appellant's brother, in August he received RM100,000 to settle the appellant's debts.
- d* Sometime in July, the appellant telephoned a lawyer in Kota Baru (PW40) to ask him, as the appellant had done several times before, to join the appellant's firm as a partner. The lawyer declined. The appellant asked him to do his cases, as he had done before, because the appellant was going overseas on some business. The appellant had, on another occasion in early July in Kota Baru, told him he would be away two or three months.
- e* According to Hj. Othman, of whom mention has been made, after 20 or 23 July, he went to Indonesia with Abd. Rahman bin Ayub, of whom mention has also been made, and Harun, who had been introduced to him by Abd. Rahman as his business partner. From Indonesia they went to Manila and came back on 31 July.
- f* According to Jusoh bin Abdullah, the appellant's clerk mentioned earlier, in July he did fly to Singapore from Subang with the appellant, Harun and Abd. Rahman at the appellant's invitation. In Singapore Jusoh had shared a hotel room with the appellant. On one occasion four or five people - Malaysian businessmen, so the appellant told Jusoh - met the appellant in his room for several hours. The appellant went to Brunei with them for three or four days. After he came back he and Jusoh left for Jakarta where the appellant said he had some business. In
- g* Jakarta the appellant paid all of Jusoh's travelling and living expenses. From Jakarta, the four went sightseeing in Bandung. Jusoh said the appellant was at first reluctant to go to Bandung, saying he had other work to do - arranging foreign loans as a lawyer for Malaysian businessmen - but he was finally persuaded by the others. From Bandung they went back to Jakarta. When Jusoh left Jakarta for Malaysia, the appellant remained behind saying he was going on
- h* to London on similar business. The appellant also mentioned Brussels. Before Jusoh left, the appellant gave him about RM7,000 of which RM4,800 was for Jusoh and the rest for the appellant's wife. Later in his evidence Jusoh said he received RM20,000 from the appellant.
- i* According to Jusoh, when he left for Malaysia, Harun and Abd. Rahman were intending to go to the Philippines.

**Che Man Bin Che Mud v.
Public Prosecutor**

[1994] 4 CLJ

Abdul Aziz bin Mohamad J.

833

The trip to Jakarta that was related by Jusoh must have been the same trip as that related by Hj. Othman.

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If the Kota Baru lawyer is to be believed, the appellant must have come back to Malaysia because, according to the lawyer, on 1 August the appellant attended Court in Ipoh.

According to the Immigration Officer (PW37), the appellant was overseas in Singapore, Brunei, Indonesia, London and Thailand from 8 August until his passport expired on 25 March 1989.

b

According to the Kota Baru lawyer, sometime towards the middle of August the appellant telephoned him from Singapore to say that he was leaving for London and Switzerland and to ask him to attend to his cases and to bill him for it.

c

In August 1988 Abdullah bin Che Man, the businessman, saw the appellant in a casino in London.

In October 1988 the appellant was in Bangkok. When Hj. Othman brought the appellant's second wife to him from Kota Baru, he told Hj. Othman he was going overseas and gave Hj. Othman RM1,500 which Hj. Othman thought was for Hj. Othman's children.

d

Harun's misdeed in Bank Negara was discovered only on 18th November when Bank Simpanan Nasional received a statement dated 15 November of advance deposits received from Bank Simpanan Nasional for the relevant period and it was noticed that the RM22.2 million ringgit was not included.

On 23 November the manager of the Accounting Department of Bank Negara lodged a police report.

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In February 1989 the police gave a press release about the appellant. A photograph of the appellant was published.

There had been negotiations between police officers of Bukit Aman and a lawyer acting for the appellant about his surrender. About six weeks after the negotiations, on 4 April 1989, the appellant turned up to Bukit Aman saying, "I hear you want to see me. I am here".

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On 11 April 1989, Harun was arrested in Jakarta.

On 17 April 1989, they were charged as related earlier.

g

As to the part played by Harun, the learned trial Judge concluded that the evidence for the prosecution case showed that Harun had done a series of acts which resulted in the credit in Bank Negara arising from Bank Simpanan Nasional's cheque for RM22.2 million being transferred to the account of Che Man & Partners at the Dayabumi branch of Bank Bumiputra. She said that Harun had also forged the signatures of his superior officers on the debit voucher which authorized the crediting of RM22.2 million to Bank Bumiputra's account No. 1554010059.

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I think those conclusions are amply supported by the evidence. Looking at the facts that I have set out, I do not think there can be any other conclusion to be drawn. There cannot be any doubt that it was Harun who had caused the credit to move from Bank Negara to the account of Che Man & Partners and had forged

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- a* the signatures of his superior officers on the relevant documents as a step necessary to accomplish the purpose.

As to the part played by the appellant, the facts I have set out leave no doubt that the plan to defraud Bank Negara was conceived well before 1 July 1988 and that Harun was to be the principal instrument at the Bank Negara end. The plan needed to have some one at the receiving end of the right standing so that what needed to be done could be done without difficulty and without exciting suspicion.

- b*
- c* A lawyer was needed for that purpose and the appellant was enlisted. The learned trial Judge deduced that the appellant and Harun must have been in communication with each other at the relevant time as otherwise Harun would not have known the account number of the Dayabumi account to instruct Bank Bumiputra Money Market to effect a transfer to that account. I agree with the learned trial Judge.

- d* The learned trial Judge said that the effect of all the evidence before her led to the inevitable conclusion that the appellant was fully aware of the commission of a crime by Harun. Although in one or two respects the inferences of fact on which she arrived at that conclusion may not be sound, I agree with the conclusion. Looking at the entire evidence as I have set out, I would not draw any other conclusion but that the appellant knew that the account he was going to open at the Dayabumi branch was to receive the fruit of Harun's misdeed in Bank Negara.

- e* The principal question that arises in this appeal is whether what Harun was shown by the evidence to have done in Bank Negara amounted in law to the offence of theft as defined in s. 378 of the Penal Code. If it did not amount to theft, there would have been no case against the appellant of abetment of theft.

- f* That question calls for interpretation of s. 378. learned Counsel for the appellant went so far as to submit on the development in the English law of theft in order to show that s. 378 is of limited application and does not apply to what was done by Harun in this case. For my part, I find that to decide that question for this appeal I need not refer to the English position. I need only consider the section on its own terms.

Section 378 says:

- g* Whoever, intending to take dishonestly any movable property out of the possession of any person without that person's consent, moves that property in order to such taking, is said to commit theft.

Movable property is defined in s. 22 as follows:

- h* The words 'movable property' are intended to include corporeal property of every description, except land and things attached to the earth, or permanently fastened to anything which is attached to the earth.

"Movable property" must therefore be corporeal property, that is to say, property consisting or in the form of a material object. It must be something that can be perceived by the senses.

- i* A cheque for a certain amount is movable property. A currency note is movable property. A coin is movable property.

A person has a RM100 currency note. That is movable property. He deposits the note at a bank and gets an acknowledgment of credit in a bank deposit book. The bank deposit book is movable property, but the fact, as evidenced by the credit in the deposit book, that the bank owes him money to the value of RM100 is not movable property. This is not the same as having a RM100 note in the deposit book. The person does not have a RM100 note. All that he has is the right to claim the RM100 note or its equivalent from the bank. That right is not corporeal property and is therefore not movable property.

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Under s. 378, the subject of theft must be "movable property". There cannot be theft of incorporeal property.

Under s. 378, to constitute theft there must be a dishonest intention to take a movable property out of its rightful possession coupled with the act of moving that property. The movable property intended to be taken must be the one and the same movable property that is actually moved. That movable property is the one that is to be the proper subject of the charge.

c

In the abetment charge against the appellant, what movable property is the subject of the alleged theft by Harun? The subject is stated to be "Malaysian Ringgit Twenty-Two Million Two Hundred Thousand (RM22,200,000)", but what corporeal thing does that intend to refer to? The only possible corporeal things in this case are the Bank Simpanan Nasional cheque for RM22.2 million and the currency notes totalling RM22.2 million that the Dayabumi branch paid out through Nordin. It cannot be the cheque, as if so the charge would have said so. Neither can it be the currency notes paid out because Harun did not move them and they left the possession of Bank Bumiputra with Bank Bumiputra's consent. There was no theft by Harun of those currency notes within the definition of s. 378. If it is neither the cheque and nor the money paid out, the subject as stated in the charge can only be a notional amount or sum of what is owing to somebody, and that is not movable property.

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It is understandable why the charge does not state a specific object that represents the sum of RM22.2 million. It is because it is impossible, on the evidence available, to point to the movable property that Harun intended to take out of the possession of Bank Negara that is the one and the same movable property that he moved with that intention. What Harun did was not to move a movable property with the intention of taking the same property out of the possession of Bank Negara but to manipulate things in such a way that, instead of Bank Negara becoming indebted to the Accountant-General in the sum of RM22.2 million, it became indebted to Bank Bumiputra in that amount and Bank Bumiputra in turn became indebted to Che Man & Partners in an equal amount, which debt was discharged when Bank Bumiputra, at its Dayabumi branch, paid out moneys totalling RM22.2 million on cheques issued by the appellant. No cash money passed from Bank Negara to Bank Bumiputra.

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The learned trial Judge in her judgment did not at all deliberate the question whether the amount of RM22.2 million stated in the charge was movable property. She merely said, after quoting s. 378: "Hence it is implicit that by his action Harun had dishonestly moved the said sum of RM22.2 million out of the possession of Bank Negara without its consent". Then, after referring to the

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a conviction of Harun for theft on his guilty plea and quoting a statement of Shaik Daud J. in Harun's application to the High Court after his conviction and sentence in Federal Territory Criminal Application 44-27 of 1989, she came to "the irresistible conclusion" that the essential ingredients of the offence of theft by Harun had been proved. What Shaik Daud J. said was this:

b ... as long as any act is done which resulted in the movement of property from one place to another with the dishonest intention of permanently depriving the owner thereof there is theft ... ,

The learned DPP did not in this appeal touch directly on the question of identifying what is the movable property in this case that Harun had moved to constitute what he had done a theft. He referred to Explanations 3 and 4 and Illustration (b) under s. 378, but those explanations and illustration are relevant to the question of the meaning of "moves", not the meaning of "movable property". He also referred to the report on *Regina v. Crick* in the Times Law Report of August 18, 1993, where the Court of Appeal was reported as having stated:

d For the purposes of the offence of obtaining property by deception under the Theft Act 1968, a sum of money represented by a figure in an account fell within the phrase 'other intangible property' in s. 4(1) and accordingly a transaction, although effected by electronic means, was an obtaining of intangible property.

e But that case is irrelevant to the present case because the offence considered there was the English offence of obtaining property by deception, which is entirely different from the offence of theft under s. 378. In fact, as far as the meaning of "movable property" is concerned, that decision is in favour of the appellant in as much as it was held that a sum of money represented by a figure in an account is intangible property, that is to say, not corporeal or movable property.

f The learned DPP said that the offence of theft by Harun was completed when money was cashed by the appellant, that is to say, as I understand it, when cash was paid out on the appellant's cheques. Now it is obvious from s. 378 that the offence of theft is completed the moment the movable property in question is moved. Viewing what the learned DPP said against s. 378, it would appear that he was thinking that the moving was done when money was paid out and that therefore the movable property was the money that was paid out, but as I have already said, Harun did not move the money, the money came from the possession of Bank Bumiputra, not Bank Negara, and Bank Bumiputra consented to the money being paid out.

g Harun did not commit theft as defined in s. 378 and accordingly the appellant could not rightly have been convicted of abetment of theft by Harun.

h That, however, is not the end of the matter. I have still to consider whether the appellant should have been convicted under either of the other two charges of which he was acquitted in the Sessions Court at the close of the case for the prosecution, namely the principal charge of abetting criminal breach of trust and the first alternative charge of abetting cheating. In criminal breach of trust and cheating, the subject is not confined to movable property, but may include incorporeal property.

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As regards criminal breach of trust, the main submission of learned Counsel for the appellant at the close of the case for the prosecution was that Harun was not entrusted with dominion over "RM22.2 million".

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In my opinion, when Bank Negara, Harun's employer, assigned him to the job, as clerk in the Public Debt Division, of receiving cheques for advance subscriptions for government securities, Bank Negara impliedly entrusted to Harun the cheques that he might receive, or dominion over them. The Bank Simpanan Nasional cheque in this case represented a value of RM22.2 million for the credit of Bank Negara, which was incorporeal property having the character of a chose in action.

b

By the rules governing the manner Harun was to discharge his duty, he was to take the proper steps to ensure that the amount was credited to the Accountant-General. Instead he took steps that resulted in the amount being credited to the account of Che Man & Partners.

c

The learned DPP in the Court below contended that Harun had disposed of the property entrusted to him in violation of the legal contract that he had made touching the discharge of the trust, the legal contract being his contract of service with Bank Negara and the rules governing his duties which should be considered as part of the contract.

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I note that learned Counsel for the appellant in the Court below did not offer any submission on this aspect of the offence of criminal breach of trust at the close of the case for the prosecution.

It would appear from the judgment of the Federal Court in *Public Prosecutor v. Yeoh Teck Chye* [1981] 2 MLJ 176 that when a bank manager approves the paying out of moneys in excess of the amount standing to the credit of a customer or in excess of the amount of overdraft approved for him, the bank manager disposes of the bank's funds entrusted to him in breach of "an implied legal contract governing the manner in which [he] was authorised to dispose of the funds of the bank". From that it would, I think, follow that an employee who disposes of any property entrusted to him by his employer in any way contrary to what his employer expects or authorises him to do disposes of it, for the purposes of the definition of criminal breach of trust in s. 405 of the Penal Code, in violation of an implied legal contract which he has made touching the discharge of the trust.

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In my opinion, on the evidence for the prosecution, the offence that Harun did commit was criminal breach of trust in respect of the credit of RM22.2 million. As he was a clerk of Bank Negara, the proper offence was criminal breach of trust by a clerk under s. 408.

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But, on the evidence for the prosecution, did the appellant, in law, abet the offence of criminal breach of trust by Harun?

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Abetment by instigation is out of the question, because there is no evidence for it.

As to abetment by conspiracy, from the evidence there is no doubt that there was a plan to divert a credit amount in Bank Negara from the Accountant-General's account to Bank Bumiputra's account and, from there, and so that the credit could be converted to money, to a private account in Bank Bumiputra. For the

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- a* success of the plan certain people had to be engaged for certain roles. Harun was to effect the diversion and the appellant was to provide the facilities for the final destination and encashment of the credit. The mastermind could have been Harun or someone else. The appellant received for certain RM333,000 for his part. He might have received more. However, from the evidence, it cannot be said that he was the mastermind.
- b* There is no evidence as to the circumstances in which the appellant took on the role that the evidence showed he actually played. There are only probabilities that arise from the entire evidence. It is probable that the appellant had taken part in the formation of the whole plan right from the beginning with Harun and others, such as Norlah Khan. If that had been the case, he could be said to have engaged with one or more other person or persons in a conspiracy for the
- c* commission of breach of trust by Harun, and he would have abetted the commission of that offence by Harun. On the other hand - more so if one recalls what happened to Abdullah bin Che Man the businessman - it is equally probable that the appellant had been approached by someone, either Harun or someone else, and been offered the part he was to play and given instructions as to what
- d* he was supposed to do. The appellant might have asked where the money was coming from and he might have been told that Harun would take care of that, that the appellant did not need to concern himself with that problem and that all that he needed to do was to open the account and later issue the cheques and so on. If that had been the case, the appellant could not be said to have engaged with one or more other person or persons in a conspiracy for the commission of breach of trust by a Harun.
- e* In any case, if there had been an engaging in a conspiracy by the appellant, the time and place could not have been as in the charge, but earlier and at some place or places other than the Dayabumi branch of Bank Bumiputra.
- f* Because there is no direct evidence of conspiracy involving the appellant, or any one else for that matter, and the evidence for the prosecution lays itself open as well to the probability that the appellant did, as to the probability that he did not, engage in any conspiracy for the commission of criminal breach of trust by Harun, there is no proof beyond reasonable doubt for abetment by conspiracy by the appellant.
- g* For abetment by aiding, it is necessary to determine at what point in time Harun committed the criminal breach of trust. In my opinion it was not later than the time when the teller at the Kuala Lumpur branch of Bank Negara received the debit voucher that Harun had forged for crediting the RM22.2 million into Bank Bumiputra's account. After that the credit went into Bank Bumiputra's account and there is no evidence that Harun was entrusted with that account or with dominion over it, so that Harun's instruction to Bank Bumiputra Money Market to transfer RM22.2 million from that account to the Dayabumi account could not
- h* constitute an act of breach of trust, and the appellant's opening of the Dayabumi account could not constitute abetment of that act by aiding.
- i* The offence of criminal breach of trust by Harun having been committed before the time Bank Bumiputra's account was credited, the opening of the Dayabumi account by the appellant cannot be said to have facilitated the doing of anything by Harun up to and including that point in time. It may be that Harun would not have performed his part of the plan in Bank Negara unless there was an account

**Che Man Bin Che Mud v.
Public Prosecutor**

[1994] 4 CLJ

Abdul Aziz bin Mohamad J.

839

ready to which the amount of RM22.2 million would finally be credited, but nonetheless the facility provided by the account was a facility not for the commission of the criminal breach of trust but for the subsequent gathering of the fruit of the crime.

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Therefore, on the evidence, the appellant did not, in law, abet the criminal breach of trust by Harun.

b

As to the offence of cheating, although the charge against the appellant did not specify who it was that Harun was alleged to have cheated, it must be taken from the charge against Harun that it was the management of Bank Negara and that the deception consisted in the presentation of the forged debit voucher to transfer RM22.2 million into the account of Bank Bumiputra. Therefore, if at all Harun committed the offence of cheating, it was the case for the prosecution that the offence was committed when the teller, upon being handed the forged voucher, credited the account of Bank Bumiputra, which is the same point in time as the offence of criminal breach of trust was, in my opinion, committed. I need not make a finding as to whether there was an offence of cheating because, even if there was, the appellant, for the same reasons as I have given in respect of criminal breach of trust, did not, on the evidence, abet the commission of the offence of cheating by Harun, whether by instigation, by conspiracy, or by aiding.

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I think the learned trial Judge was right in not finding that the prosecution had made out a case to answer on the principal charge or the first alternative charge.

In the result, I allow the appeal, quash the conviction of the appellant and set aside the sentence. As the compensation order under s. 426(i)(b) of the Criminal Procedure Code could only have been made against a convicted person, I also set aside that order.

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